

# Finance and Administration Cabinet Protest Procedure

The following is a narrative description of the procedure for bid protests to the Finance and Administration Cabinet.

## The Protest

A protest can be made either (1) to the solicitation documents or (2) to an award of contract based upon the solicitation. The protest process for Requests for Bids ("RFB") and for Request for Proposals ("RFP") is the same.

## Protest To A Solicitation

Any prospective bidder may file a protest to the content of solicitation documents. KRS 45A.285(2). A party seeking to establish standing as a "prospective bidder" must show that it has a direct economic interest that will be impacted by the award of the contract or by the failure to award the contract. See 28 U.S.C. 1491 (b) (1). A prospective bidder has standing when it shows it had a substantial chance of obtaining the award. *Myers Investigative and Security Service, Inc .v. United States*, 275 F. 3d 1366, 1370 (Fed. Cir. 2002). A protest to the solicitation documents is directed at the contents of the solicitation, for example, the protest may concern an irregularity in the evaluation process apparent from the face of the solicitation document itself.

A protest to a solicitation should be filed *before* the protestor actually submits a bid or proposal. Once a party submits a bid or proposal to a solicitation and the bids are opened, the protestor then has waived all objections to the solicitation document not previously raised. See 4 C.F.R §21.2(a)(1) ("Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals."); *Parsons Precision Products, Inc., Comp. Gen. B-249940*, 92-2 CPD 431 ("a bidder who participates in a procurement through the point of bid opening without objection is deemed to have acquiesced in the agency's statement of the terms and conditions.")

## Protest To An Award

In general, only an actual bidder can file a protest to an award of contract. KRS 45A.285(2). A protester is an "actual bidder" if the protestor has submitted a bid or proposal. A protest to an award of contract may concern, for example, mistakes in the application of the evaluation process. A party may protest the award of a non-competitive contract such as a sole source award if it can demonstrate that it would have bid on the contract if it had been competitively bid. See *CW Travel v. United States*, 61 Fed. Cl. 559, 570 (2004) (Where a claim is made that the Government violated procurement rules by refusing to

engage in a competitive procurement, it is sufficient for standing purposes if the plaintiff shows that it would have competed for the contract had the Government publicly invited bids or requested proposals.)

### Where To Protest

All protests must be in writing. KRS 45A.285(2) The written protest must be delivered to the Secretary of the Finance and Administration Cabinet. The Secretary will investigate, analyze, and determine the protest. 45A.285(1). The address of the Secretary of the Finance and Administration Cabinet is:

Office of the Secretary  
Finance and Administration Cabinet  
Room 383, Capitol Annex  
Frankfort, KY 40601

In order to ensure the protest is timely, it should be *received* by the Office of the Secretary within the applicable time limits. The Secretary will *not* receive protests by facsimile transmission or by electronic mail. *Cf.* FAP 111-35-00 (no fax'ed bids accepted).

### The Time Limits For Filing A Protest

A protest must be filed promptly and, in any event, within fourteen (14) calendar days after the aggrieved person *knows or should have known* of the facts giving rise thereto. KRS 45A.285(2). This requirement applies both to an initial protest and to revisions or supplements to the protest. *See GEC Avionics, Inc.*, Comp Gen Dec B-250957, 93-2 CPD 24.

"Filed" means *actual receipt* by the Office of the Secretary. *See Matter of: CD-Tabco Products Inc.—Reconsideration*, B- 252637 (April 12, 1993) ("The term "filed" regarding protests to our Office means receipt of the protest in the General Accounting Office. 4 C.F.R. § 21.0(g)"; ABA, Model Procurement Code, Recommended Regulations, R9-101.03.1. For purposes of computing the fourteen (14) calendar day deadline for the submission of a protest, the following legal presumptions apply:

(a) For protests based upon alleged improprieties in a solicitation for bids or proposals which relate to the solicitation documents themselves, the facts giving rise to the protest shall be presumed to have been known to the protester on the date the solicitation, or a modification to it, was posted to the Commonwealth of Kentucky's eProcurement web site. 200 KAR 5:380 (1) (a).

(b) For protests based upon alleged improprieties in the award of a contract, the facts giving rise to the protest shall be presumed to

have been known to the protester on the date the contract award was posted to the Commonwealth of Kentucky's eProcurement web site. 200 KAR 5:380 (1)

A legal presumption is a fact assumed from the specific circumstances. The legal presumption in this case may be overcome upon presentation of *clear and convincing* evidence showing that the facts giving rise to the protest were not and could not have been known to the protester on the date presumed by the regulation. 200 KAR 5:380 (1).

The fourteen (14) day period in which to file a protest does not include the day on which the alleged basis for protest arises. See Kentucky Rules of Court, CR 6.01; 4 C.F.R. § 21.0(e). If the last day of the fourteen (14) calendar day period within which a protest is to be filed falls on a Saturday, Sunday, or Legal Holiday, the period in which to file a protest is extended to the next day not a Saturday, Sunday, or Legal Holiday. See Kentucky Rules of Court, CR 6.01; 4 C.F.R. § 21.0(e). Thus, if an award of contract is made on a Friday, the fourteen (14) calendar day period would commence on the next day, Saturday, and run through the Saturday fourteen (14) days later. Since the time period in which to file a protest ends on Saturday, the time in which to file a protest would be extended to the following Monday.

Note, however, that the Finance and Administration Cabinet will not extend the fourteen (14) calendar day period if a Legal Holiday or other event excusing a filing on the fourteenth (14<sup>th</sup>) day occurs on another day during the applicable time period. Thus, for example, if the Finance and Administration Cabinet is closed for a Legal Holiday on the thirteenth (13<sup>th</sup>) calendar day but is open on the fourteenth (14<sup>th</sup>) calendar day, the thirteenth (13<sup>th</sup>) day will still count against the fourteen (14) day time period, and the protest must be filed on the next calendar day.

#### The Contents Of The Written Protest

A written protest *must* contain the following information:

- (1) Name, address, and fax and telephone numbers of the protester;
- (2) Solicitation or contract number;
- (3) Detailed statement of the legal and factual grounds for the protest, including a description of the prejudice resulting to the protester;
- (4) Copies of documents ready reference to which is believed necessary to assess the factual or legal basis of the protest;

(5) Statement as to the form of relief requested;

(6) The date the facts giving rise to the protest became known to the protester; and

(7) If necessary to rebut the presumption established by 200 KAR 5:380 (1), all relevant factual information establishing the timeliness of the protest under KRS 45A.285(2) and purported to be sufficient for a justifiable finding of timeliness under that statutory provision. Failure to comply with this subsection, if necessary, shall conclusively render the protest untimely. 200 KAR 5:380(2)

A protest which fails to contain the required information may be denied solely on that basis. 200 KAR 5:380(2).

#### The Effect Of A Timely Protest.

In the event that a protest is timely filed, the Commonwealth will not proceed further with the solicitation or the award involved, unless the Secretary of the Finance and Administration Cabinet makes a written and adequately supported determination that continuation of the procurement is necessary to protect substantial interests of the Commonwealth. KRS 45A.290

#### The Determination Of The Protest

All protests will be referred to the agency administering the solicitation for a response. When a protest is filed with respect to an award of contract, the contract awardee will be provided with a copy of the protest and invited to respond within fourteen (14) calendar days. *Charlie's Towing & Recovery, Inc. v. Jefferson County, Ky.*, 183 F.3d 524, 527 (Ct.App. 6, 1999). A hearing is not available. See KRS 45A.285(3); See also *Charlie's Towing, supra*, 183 F.3d at 527 (6th Cir. 1999) ("There being no entitlement to an award of the bid under state law, there is no constitutionally protected property interest."); *United of Omaha Life Ins. Co. v. Solomon*, 960 F.2d 31, 34 (6th Cir. 1992) ("Michigan statutory and case law neither requires that the lowest bidder be awarded a state contract nor creates a property interest in disappointed bidders on state contracts.").

The Secretary or his designee will issue a written determination of the protest. The Secretary or his designee will only issue a determination of the grounds asserted in the protest. KRS 45A.285(1). A protest which is untimely, fails to establish standing to protest, or fails to include the information required by 200 KAR 5:380(2), will be summarily determined and denied. In other cases, the determination will contain findings of fact, an analysis of the protest, and a conclusion that the protest be either sustained or denied. If the protest is

sustained, remedies include canceling the solicitation, canceling the award, rescoring the bidders or proposers, or other remedies appropriate to the situation. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

The decision by the Secretary of the Finance and Administration Cabinet (or his designee) is final and conclusive. KRS 45A.285(4).